MOTION FILED
MAY 9 1977

No. 76-678

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

SHELL OIL COMPANY,
Petitioner,
v.
ANNE M. DARTT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

JAY S. SIEGEL
SIEGEL, O'CONNOR & KAINEN
60 Washington Street
Hartford, Connecticut 06106

FRANK C. MORRIS, JR.
McGUINESS & WILLIAMS
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Of Counsel:

McGUINESS & WILLIAMS
ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

INDEX

Page

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* 1

STATEMENT OF THE CASE 5

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. The Statutory Scheme and Congressional Intent Make Clear That The Explicit Notice Requirement of Section 7(d)(1) of The ADEA Is Jurisdictional And Must Be Strictly Construed 8

A. The Language Used By Congress In The Act Is Concise, Unambiguous And Carefully Selected 8

B. The Overwhelming Judicial Authority Has Sustained The Mandatory Nature Of The Jurisdictional Requirement Of Timely Notice Under The Act 11

II. This Court Should Not Create A Special Exception To The Act's Jurisdictional Prerequisites 18

CONCLUSION 25

TABLE OF AUTHORITIES CITED

Page

Acford v. *Exxon Corp.*, 12 FEP Cases 1500 (D. Conn. 1975) 24
Alexander v. *Gardner-Denver*, 415 U.S. 36, 7 FEP Cases 81 (1974) 17
American Pipe & Constr. Co. v. *Utah*, 414 U.S. 538 (1974) 15
Bowe v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 2 FEP Cases 121 (7th Cir. 1969) 21
Brennan v. *Ace Hardware Corp.*, 495 F. 2d 368, 7 FEP Cases 657 (8th Cir. 1974) 9, 19, 23
Brohl v. *Singer*, 407 F. Supp. 936, 12 FEP Cases 541 (M.D. Fla. 1976) 12
Burgett v. *Cudahy Company*, 361 F. Supp. 617, 6 FEP Cases 201 (D. Kan. 1973) 19, 24
Edwards v. *Kaiser Alum. & Chem. Sales, Inc.*, 515 F. 2d 1195, 10 FEP Cases 1398 (5th Cir. 1975) 13
Hiscott v. *General Elec. Co.*, 521 F. 2d 632, 11 FEP Cases 292 (6th Cir. 1975) 12, 23, 24
Hodgson v. *Humphries*, 454 F. 2d 1279, 20 W.H. Cases 444 (10th Cir. 1972) 10
Hodgson v. *Miller Brewing Co.*, 457 F. 2d 221, 20 W.H. Cases 500 (7th Cir. 1972) 22
Int'l Union of Elec. Workers, Local 790 v. *Robbins & Meyers, Inc.*, —— U.S. ——, 13 FEP Cases 1813 (1976) 3, 6-7, 16, 17, 18, 20
Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454, 10 FEP Cases 817 (1975) 7, 17, 18
Kavanaugh v. *Noble*, 332 U.S. 535 (1947) 18
Law v. *United Airlines, Inc.*, 519 F. 2d 170, 12 FEP Cases 1084 (10th Cir. 1975) 14
Looney v. *Commercial Union Assurance Cos.*, 14 FEP Cases 843 (E.D. Mich. 1977) 12, 21
McCrickard v. *Acme Visible Records, Inc.*, 409 F. Supp. 341, 13 FEP Cases 822 (W.D. Va. 1976) 12, 21, 22
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 11, 17

TABLE OF AUTHORITIES—Continued

Page

Midstate Co. v. *Pennsylvania RR Co.*, 320 U.S. 356 (1943) 18
Moses v. *Falstaff Brewing Corp.*, 525 F. 2d 92, 11 FEP Cases 828 (8th Cir. 1975) 13, 22
Naton v. *Bank of Calif.*, 14 FEP Cases 166 (N.D. Cal. 1976) 10
Ott v. *Midland Ross Corp.*, 523 F. 2d 136, 11 FEP Cases 539 (6th Cir. 1975) 15
Pachero v. *Phelps Dodge Corp.*, 531 F .2d 709, 13 FEP Cases 255 (5th Cir. 1976) 18
A.J. Philips Co. v. *Grand Trunk Western RR Co.*, 236 U.S. 662 (1914) 18
Platt v. *Burroughs Corp.*, 424 F. Supp. 1329, 14 FEP Cases 1057 (E.D. Pa. 1976) 12, 14, 22
Powell v. *Southwestern Bell Tele. Co.*, 494 F. 2d 485, 8 FEP Cases 1 (5th Cir. 1974) 14, 17, 20, 24
Rogers v. *Exxon Research & Engineering*, —— F. 2d ——, 14 FEP Cases 518 (3rd Cir. 1977) 17, 19, 22-23
Sant v. *Mack Trucks, Inc.*, 424 F. Supp. 621, 13 FEP Cases 854 (N.D. Cal. 1976) 20
Shelley v. *Bayou Metals*, 422 F. Supp. 545, 14 FEP Cases 931 (W.D. La. 1976) 17, 18

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C .621 *et seq.* 2
Section 7 21
Section 7(b) 8, 19-20
Section 7(d)(1) 6, 8, 11, 12, 14, 15, 17, 18, 20, 22, 25
Section 7(d)(2) 8, 20, 23
Section 7(e) 9, 14, 15
Fair Labor Standards Act, 29 U.S.C. § 216(b) 22
Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e, *et seq.*) 11, 20
Portal to Portal Act, 29 U.S.C. § 255(a) 9
Section 6 9

TABLE OF AUTHORITIES—Continued

Miscellaneous:	Page
S. Rep. No. 723, 90th Cong., 1st Sess. 5 (1976)	19
Agatstein, The Age Discrimination in Employment Act of 1967: A Critique, 19 N.Y.L.F. 309 (1973)	19
Procedural Aspects of the Age Discrimination in Employment Act of 1967, 36 U. Pitt. L. Rev. 914 (1975)	20
House Report No. 805, 1967 US Code Cong. and Adm. News 2213	13

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-678

SHELL OIL COMPANY,
Petitioner,
v.
ANNE M. DARTT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council (hereafter EEAC) moves this Court for leave to file the accompanying brief as *Amicus Curiae* in support of the position of the petitioner, Shell Oil Company, in this case. In support of this motion, EEAC shows as follows:

1. This motion for leave to file is necessary under Rule 42(3) because counsel for the respondent has advised that consent for the filing of this brief would not be granted. Counsel for the petitioner has given her written consent, which has been filed with the Clerk of the Court.

2. The questions presented for review in this case raise issues of substantial importance to the *Amicus Curiae*. The issues herein involve the interpretation of Section 626(d) of the Age Discrimination in Employment Act of 1967, 29 USC 621 *et seq.* (ADEA or the Act), which provides that no private civil action may be commenced under the ADEA until the person alleging age discrimination has given the Secretary of Labor not less than 60 days' notice of an intent to file such a suit. Section 626(d) also states that such notice shall be filed within 180 days after the alleged unlawful practice occurred. Briefly summarized, the Court is asked to decide whether this notice filing requirement is a jurisdictional prerequisite or rather, whether the notice requirement may be tolled or suspended under circumstances which would toll an ordinary statute of limitations.

3. The Equal Employment Advisory Council is a voluntary, non-profit association, organized as a corporation under the laws of the District of Columbia. Its membership includes a broad spectrum of employers from throughout the United States, including both individual employers and trade and industry associations. The principal goal of EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Substantially all of EEAC's members or their constituents, are employers subject to the provisions of the ADEA, as well as other equal employment statutes and regulations. As such, they have a direct interest in the issues presented for the Court's consideration in this case.

4. Because of this interest, the EEAC sought and was granted permission by this Court to file briefs as *Amicus Curiae in Electrical Workers, Local 790* v. *Robbins & Meyers, Inc.*, —— U.S. ——, 13 FEP Cases 1813 (1976), and *United Air Lines, Inc.* v. *Carolyn J. Evans* (Docket No. 76-333). Both cases involved the construction to be given the statute of limitations contained in Title VII of the Civil Rights Act of 1964 (42 USC 2000e, *et seq.*) Similarly, EEAC has filed *amicus curiae* briefs in other cases now pending before this Court. See *East Texas Motor Freight System, Inc.* v. *Rodriguez* (Docket No. 75-651); *T.I.M.E.-D.C., Inc.* v. *U.S.* (Docket No. 75-672); and *Trans World Airlines, Inc.* v. *Hardison* (Docket No. 75-1126).

5. The movant *Amicus*, and its members, have broad knowledge concerning the issues in this case. Because of this knowledge, the *Amicus* is uniquely situated to brief the Court on the practical as well as legal aspects of the issues presented here.

WHEREFORE, it is respectfully moved that the EEAC be granted leave to submit the accompanying brief as *Amicus Curiae* in this case.

Respectfully submitted,

JAY S. SIEGEL
SIEGEL, O'CONNOR & KAINEN
60 Washington Street
Hartford, Connecticut 06106

FRANK C. MORRIS, JR.
McGUINESS & WILLIAMS
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Of Counsel:

McGUINESS & WILLIAMS
ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-678

SHELL OIL COMPANY,
Petitioner,

v.

ANNE M. DARTT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

STATEMENT OF THE CASE

Plaintiff Dartt initiated this individual action under the Age Discrimination in Employment Act (hereinafter referred to as ADEA) in the district court on May 21, 1974, alleging that her discharge

by Shell Oil Company on July 31, 1973, was motivated by age discrimination. The district court dismissed the suit because Dartt had not filed a notice of intent to sue within 180 days after her discharge, as required by Section 7(d)(1) of ADEA.

On appeal, the Tenth Circuit rejected Dartt's contention that her oral complaint to the Department of Labor Wage and Hour Division was adequate to satisfy the requirement of filing a written notice of intent to sue,[1] but concluded that the specific statutory 180-day notice period should be treated as a statute of limitations rather than a mandatory jurisdictional prerequisite and could be extended indefinitely under the equitable doctrine of tolling. It then determined that the notice filed by Dartt's attorney 216 days after her discharge, and 36 days late under ADEA, was sufficient in this case. The relevant underlying facts are fully detailed in Shell Oil Company's brief to this Court and are adopted herein by the *Amicus Curiae*.

SUMMARY OF ARGUMENT

The conclusion reached by the district court in this case—that filing of a notice of intent to sue within the 180-day period specified in § 7(d)(1) is a jurisdictional prerequisite to a private suit under ADEA—is consistent in principle with this Court's recent decisions holding that the filing and notice provisions of employment discrimination laws may not be judicially altered or set aside, even briefly. See *Int'l Union of Electrical Workers, Local 790* v. *Robbins*

[1] The Wage and Hour Division informed the Company that Dartt had not filed a Notice of Intent to Sue.

& Myers, Inc., —— U.S. ——, 13 FEP Cases 1813 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 10 FEP Cases 817 (1975). Indeed, the court of appeals acknowledged that there was "ample authority" supporting the district court's holding. 539 F.2d at 1259, 13 FEP Cases at 13. Nevertheless, the court of appeals reached the opposite conclusion, reasoning that Congress did not intend the 180-day notice requirement to be an "absolute prerequisite" to private ADEA actions. The *Amicus* submits that the court of appeals' interpretation of the legislative intent is misguided and would, in fact, undermine the carefully designed Congressional scheme for implementing the ADEA.

As shown below, the 180-day limitation on giving of notice is an integral part of the Congressional plan whose strict statutory language emphasizes prompt, effective conciliation rather than private suits, as the favored means of resolving age discrimination complaints. The decision below is contrary to this Congressional intent, would encourage the litigation of stale claims, and fosters uncertainty with respect to the proper time for filing notice of intent to sue under the ADEA. The requirement that individuals file a notice of intent to sue within 180 days of the alleged discriminatory practice is a jurisdictional rule that is easily determined, capable of consistent administration and possessed of a high degree of certainty. Such a provision helps to achieve national uniformity and prevent vexatious litigation.

ARGUMENT

I. THE STATUTORY SCHEME AND CONGRESSIONAL INTENT MAKE CLEAR THAT THE EXPLICIT NOTICE REQUIREMENT OF SECTION 7(d)(1) OF THE ADEA IS JURISDICTIONAL AND MUST BE STRICTLY CONSTRUED.

A. The Language Used By Congress In The Act Is Concise, Unambiguous And Carefully Selected.

The statutory scheme of the ADEA, while conferring on individuals in Section 7(b) [29 USC 626 (b)] the specific right to sue for violations, also provides certain notice requirements as conditions precedent to bringing such civil actions. Thus, Section 7 (d) [29 USC 626(d)] expressly provides:

> (d) No civil action may be commenced by any individual under this section until the individual has given the Secretary [of Labor] not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred . . .[2]

Under the statute, the giving of such notice then invokes a corresponding duty upon the Secretary of Labor, to wit:

> . . . upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

[2] The statute expands the 180-day period to 300 days under Section 7(d)(2) [29 USC 626(d)(2)] where a state agency exists that has authority to act over complaints involving age discrimination. Oklahoma does not have such an agency so this extended period is not here involved.

Thus, the basic framework of the Act mandates two initial conditions prior to bringing private suit. It requires an allegedly aggrieved individual to invoke certain notice-giving machinery within a fixed period of time to put any "prospective defendants" on notice through the filing of a notice of intent to sue with the Secretary of Labor and to afford the Labor Department an opportunity to try to resolve the matter by exhaustive pursuit of informal methods short of litigation [3] before a suit may be commenced. Each of these elements is the product of sound reason and confirms the existence of an overall integrated procedure under the Act. They relate solely to the steps required prior to the commencement of a private civil action and in no way relate to the period of time within which suit can be brought under the Act's separate statute of limitations.

This latter subject is specifically treated in ADEA Section 7(e) [29 USC 626(e)] which incorporates by reference the limitation on actions provision of Section 6 of the Portal to Portal Act.[4] Any doubts that Congress intended 626(e) to be a separate and distinct feature of the statutory scheme are dispelled by the heading of Section 6: "Statute of Limitations."

[3] *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368, 374, 7 FEP Cases 657, 661-662 (8th Cir. 1974).

[4] 29 USC 255. The section provides for either a two-year or a three-year limitation period, the latter in the case of willful violations.

Thus, once a prospective plaintiff has given the required notice of intent to sue within 180 days and the Secretary has been allowed the sixty-day conciliation period, the plaintiff may bring suit in the courts at any time thereafter within either the two (2) or three (3) year period as the case may be. Clearly, the purpose of the notice and conciliation requirement is to conclude the necessary steps leading to perfection of a right of action by an individual under the Act.

The Tenth Circuit has correctly interpreted Section 6 of the Portal to Portal Act as being no more than a "conventional procedural statute of limitations," observing, however, that "[t]he wording of Section 6 is noticeably different from that of other statutory time limitations which have been interpreted as establishing conditions precedent." *Hodgson* v. *Humphries*, 454 F.2d 1279, 1283, 20 W.H. Cases 444, 447 (10th Cir. 1972).

It is thus puzzling to understand the reluctance of the court below to give effect to the overall statutory scheme of ADEA. The court's extensive discussion of Title VII cases is misplaced in light of the asymmetrical procedural structures of the two statutes. Contrary to the view expressed below, the similarities between Title VII and ADEA are limited to their prohibitive sections. There the parallel ends, for each law embodies its own distinct enforcement provisions. "[T]he legislative history and the statutory language [of the ADEA] make clear that Congress intended to and did provide distinct enforcement procedures" under the ADEA. *Naton* v. *Bank of California*, 14 FEP Cases 166, 170 (N.D. Cal. 1976). No language expressly providing for notice of intent to sue to prospective defendants as a condition precedent to suit appears in Title VII. Thus, Congress's deliberate incorporation in Section 7(d) of the ADEA of such a specific requirement cannot be ignored by the Court.[8]

The *Amicus*, EEAC, submits that in the context of the statute before the Court, no right of action accrues to individuals *unless* they have first timely given notice of intent to sue. Once such condition precedent is satisfied, they have to bring suit within the prescribed statute of limitations "from the date the cause of action accrues". 29 USC 255(a). Thus, the 180-day notice provision is an essential thread in the fabric of the statute and represents a limitation upon the power of the federal district courts to entertain an age discrimination suit.

B. The Overwhelming Judicial Authority Has Sustained The Mandatory Nature Of The Jurisdictional Requirement Of Timely Notice Under The Act.

In reversing the district court, the Circuit below discounted the determinations of the Fifth, Sixth and Eighth Circuits and numerous district courts to the effect that Section 7(d)'s requirement that a potential claimant file notice of intent to sue within

---

[8] The most nearly comparable Title VII notice requirement is the proviso in 42 USC 2000e(5)(f)(1) that a private individual does not have the right to bring suit unless it has first received a notice from the EEOC. The giving of such notice by the Commission and its receipt by the prospective plaintiff has been interpreted by this Court as a jurisdictional precondition to maintenance of a Title VII suit in the courts. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

180 days of the alleged discrimination is a mandatory jurisdictional prerequisite to court jurisdiction over an age discrimination suit. We submit that the reasons cited by the Tenth Circuit for not adhering to this line of authority do not withstand scrutiny, and that, more importantly, the decision below serves to abrogate the carefully designed Congressional scheme for enforcement of the ADEA described above and to undermine the certainty which Congress intended.

Prior to the Tenth Circuit ruling in *Dartt*, the above three Circuit Courts of Appeal and numerous district courts[6] had all held that timely compliance with this notice provision is a jurisdictional requirement that must be met in order to commence a civil action under the Act. In *Hiscott* v. *General Electric Co.*, 521 F.2d 632, 633-634, 11 FEP Cases 292 (6th Cir. 1975), the court observed that this view was "supported by the legislative history of the Act which emphasizes the mandatory nature of the requirement that notice must be given to the Secre-

[6] See *e.g.*, *Hiscott* v. *General Electric Co.*, 521 F.2d 632, 633-634, n. 3, and 11 FEP Cases 292, 293 (6th Cir. 1975), and *Brohl* v. *Singer*, 407 F. Supp. 936, 12 FEP Cases 541 (M.D. Fla. 1976) and the extensive discussion in Shell's brief to the court here. Other courts have continued to construe the requirements of Section 7(d) as jurisdictional despite the Tenth Circuit's decision herein. E.g., *Looney* v. *Commercial Union Assurance Cos.*, 14 FEP Cases 843, 845 (E.D. Mich. 1977); *McCrickard* v. *Acme Visible Records, Inc.*, 409 F. Supp. 341, 343-344, 13 FEP Cases 822, 823-824 (W.D. Va. 1976); *Platt* v. *Burroughs Corp.*, 424 F. Supp. 1329, 1333-1335, 14 FEP Cases 1057, 1058-1061 (E.D. Pa. 1976) (No relief from jurisdictional prerequisite even where complainant asserted fear of retaliation).

tary." The Fifth Circuit, referring to such provision in *Edwards* v. *Kaiser Alum. & Chem. Sales, Inc.*, 515 F.2d 1195, 1199, 10 FEP Cases 1398, 1401 (5th Cir. 1975), reiterated its holding in *Powell* that "the 180-day notice provision is a mandatory jurisdictional condition precedent to suit." The Eighth Circuit confirmed that "most courts have regarded a timely filing of notice of intent to sue as a jurisdictional requirement". *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92, 94, 11 FEP Cases 828, 830 (8th Cir. 1975).

Any doubts as to the correctness of this prevailing judicial interpretation of the express statutory provisions are dispelled by reference to the legislative history.[7] In summary of the major provisions of the final bill before the Congress, under "Investigation and enforcement", House Report No. 805 says:

> As was stated, aggrieved persons may similarly bring actions but a *condition precedent* to the bringing of action by an individual, is notice to the Secretary and the elapse of a period of 60 days. This is to allow the Secretary to mediate the grievance. 1967 US Code Cong. and Adm. News p. 2218. (emphasis added)

Yet, in the face of the wording of the Act, the other judicial authorities and the legislative intent, the Circuit Court below "remained unconvinced" that Congress intended the failure to file a notice within the 180-day period to prevent an individual from bringing a civil action under the Act. It is difficult to imagine how the Congress could have drafted language any clearer than it did. The conclusion of

[7] The legislative history of the Act is fully discussed in the brief of Shell Oil Company.

the Tenth Circuit below is simply untenable under a plain reading of the statute which, on its face, embodies an unequivocal, and mandatory condition precedent to the "commencement" of any civil action under ADEA.

The court below asserted that it was "not contend[ing] that a filing of a notice to sue is not a condition precedent to an action under the ADEA". 539 F.2d at 1260, 13 FEP Cases at 15.[a] Rather, it submitted that the explicit 180-day time limitation was not jurisdictional but essentially a "statute of limitation," a conclusion at variance with the structure of the entire Act. This done, the court then had to explain away the holding of two panel members in *Law* v. *United Airlines, Inc.*, 519 F.2d 170, 171, 12 FEP Cases 1084, 1085 (10th Cir. 1975), that "the lodging of the notice of intent to file a civil action under the subject [Age] Act was a jurisdictional prerequisite to plaintiff's alleged cause of action . . ."

Where the circuit below missed the mark was in failing to understand the statutory framework and confusing the 7(d) jurisdictional prerequisites with the 7(e) statute of limitations. The Fifth Circuit in *Powell* v. *Southwestern Bell Tele. Co.*, 494 F.2d 485, 487, 8 FEP Cases 1, 2 (1974), on the other hand, quite readily grasped the distinction:

> The notice requirement in no way supplants the statutory period of limitation engrafted from the Portal to Portal Act. Rather it is simply a prerequisite to the right to file any suit whatsoever under the ADEA.

[a] Indeed, it admitted that "ample authority" existed in support of such position. 539 F.2d at 1259, n. 2.

In *Ott* v. *Midland Ross Corp.*, 523 F.2d 136, 11 FEP Cases 539 (6th Cir. 1975), the Sixth Circuit found the timely jurisdictional prequisites of notice under 7(d) had been given but had a serious question whether suit had been brought within the statute of limitations of Section 7(e). It specifically rejected the defendant's contention that the latter provision was "jurisdictional" and remanded the case for trial on the issue of the statute of limitations only. A similar result occurred in *Platt* v. *Burroughs Corp.*, *supra*, where the district court denied a motion to dismiss on specific acts of discrimination as to which the plaintiff had given the 7(d) notice to the Secretary of Labor and were *not* barred by the three (3) year statute of limitations. These cases illustrate a correct understanding of the statutory scheme embodied in ADEA, with the courts properly differentiating between those procedural provisions which are jurisdictional and those which are conventional statutes of limitation.

In sum, the Court here is not faced with an issue of tolling, for in actual fact, no statute of limitations question is presented on this appeal.[b] The *Amicus* contends that the circuit below should never have reached any question of tolling in this case, because the mandatory notice requirements of Section 7(d)(1) are jurisdictional in nature and not a statute of limitations. An analysis of possible equitable fac-

[b] Thus this Court's decision in *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974), and related cases, are inapposite.

tors justifying tolling arises only where a statute of limitation is involved. EEAC submits that Congress has not left to this Court the task of prescribing the conditions precedent to bringing a private civil action under the Act.

This conclusion gains support from this Court's recent decision in *Int'l Union of Electrical Workers, Local 790* v. *Robbins & Myers, Inc., supra,* —— U.S. ——, 13 FEP Cases 1813 (1976). The thrust of the *Robbins & Myers* decision was that it is not within the power of the federal courts to alter Congressionally-imposed, mandatory jurisdictional requirements which specify the time within which a defendant must be notified of a lawsuit—even under humanitarian legislation such as that embodied in Title VII.

As the Court there said (—— U.S. at ——, 13 FEP Cases at 1817):

> [T]he principal answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a "slight" delay equally acceptable. In defining Title VII's *jurisdictional prerequisites* "with precision" [Citations omitted], Congress did not leave to the courts the decision as to which delays might or might not be "slight." (emphasis added) (footnote omitted).

This conclusion is even more applicable to the ADEA since the statutory language is "abundantly clear" on this point and the legislative history thoroughly supports the conclusion that Congress pro-

vided a limited private right to sue only for individuals who expeditiously met the statutory requirements.[10] *Powell, supra,* 494 F.2d at 487-488. Since Congress established the period in Section 7(d)(1) as a jurisdictional limitation, it must be construed *stricti juris.*[11]

Such a construction of Section 7(d)(1) is also consistent with the ruling of this Court and other courts in analogous situations. This Court held recently in *Johnson* v. *Railway Express Agency, Inc., supra,* 421 U.S. 454, 10 FEP Cases 817 (1975), that the timely pursuit of administrative Title VII remedies did not prevent the prescription of an individual's claims under 42 U.S.C. § 1981.[12] Similarly,

---

[10] This is consistent with the Congressional design of the ADEA enforcement's provisions which make "private lawsuits . . . secondary to administrative remedies and suits brought by the Secretary of Labor." *Rogers* v. *Exxon,* —— F.2d ——, 14 FEP Cases 518, 523 (3rd Cir. 1977).

[11] See *Shelley* v. *Bayou Metals,* 14 FEP Cases 931, 932 (W.D. La. 1976) (Title VII case holding jurisdictional the requirement that suit be instituted within 90 days of receipt of "Right to Sue" letter).

[12] The Court had foreshadowed the decisions in *Robbins & Myers* and *Johnson* v. *Railway Express* with statements in several earlier cases. In *Alexander* v. *Gardner-Denver,* 415 U.S. 36, 47, 7 FEP Cases 81, 85 (1974), the Court had stated that Title VII vested the "federal courts with plenary powers to enforce the statutory requirements and it specifies *with precision the jurisdictional prerequisites* that an individual must satisfy before he is entitled to institute a lawsuit." (emphasis added). And in *McDonnell Douglas* v. *Green,* 411 U.S. 792, 5 FEP Cases 965 (1973), the Court referred to the timely filing of charges with the EEOC as a jurisdictional requirement under Title VII.

Title VII claims have repeatedly been held time-barred where alleged discriminatees have not filed suit within 90 days of receipt of a "Right to Sue" letter from the EEOC. The Courts "have generally held that the 90 day filing period is jurisdictional and mandatory" (*Pachero* v. *Phelps Dodge Corp.*, 531 F.2d 709, 13 FEP Cases 255, 256 (5th Cir. 1976) and cases there cited, thereby requiring that it be construed *stricti juris*. *Shelley* v. *Bayou*, *supra*, 14 FEP Cases at 932.

In sum, this case presents a statutory scheme that requires that this Court strictly construe the limitations period of Section 7(d)(1) in accord with the principles of *Robbins & Myers*, *Johnson* v. *Railway Express* and other cases [13] which have given effect to statutory limitations periods that Congress intended to be jurisdictional.

II. THIS COURT SHOULD NOT CREATE A SPECIAL EXCEPTION TO THE ACT'S JURISDICTIONAL PREREQUISITES.

In reality, Plaintiff Dartt does not seek tolling of the notice provisions of the Act, but rather a special exception excusing her from compliance with them. To accede to Plaintiff's position, however, would invite wholesale litigation over what "exceptional circumstances" would warrant nullifying the clear and precise language in the statute. Moreover, acceptance of that argument would encourage every potential litigant who has failed to comply with the notice requirements to plead for an exception in order to be allowed to maintain a suit.

[13] See *Kavanaugh* v. *Noble*, 332 U.S. 535 (1947); *A. J. Philips Co.* v. *Grand Trunk Western RR Co.*, 236 U.S. 662, 667 (1914); *Midstate Co.* v. *Pennsylvania RR Co.*, 320 U.S. 356, 364 (1943).

An equally important reason for not judicially modifying the statutorily-prescribed procedure for resolving age discrimination claims is that to do so would seriously undermine the effectiveness of the conciliation process which Congress viewed as the "most favored method of enforcement" of the ADEA. *Rogers* v. *Exxon Research & Engineering*, *supra*, —— F.2d ——, ——, 14 FEP Cases at 523 and n. 11.[14]

Congress vested primary responsibility for enforcement of the ADEA in the Secretary of Labor, who is required to "attempt to eliminate the discriminatory practice or practices alleged and to effect voluntary compliance . . . through informal methods of conciliation, conference, and persuasion" before a legal action can commence. ADEA, § 7(b), 29 U.S.C.

[14] The Congressional emphasis on conciliation, rather than private litigation, as the principal means of enforcing the ADEA is also discussed, e.g., at S. Rep. No. 723, 90th Cong., 1st Sess. 5 (1967); *Burgett* v. *Cudahy Company*, 361 F. Supp. 617, 621, 6 FEP Cases 201, 204 (D. Kan. 1973); Agatstein, The Age Discrimination in Employment Act of 1967: A Critique, 19 N.Y.L.F. 309, 319 (1973); *Brennan* v. *Ace Hardware*, 495 F.2d 368, 374, 7 FEP Cases 657, 661-662 (1974). Thus, it is beyond question that the entire "thrust of the ADEA's enforcement provisions is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor." *Rogers*, *supra*, —— F.2d at ——, 14 FEP Cases at 523. Indeed, under the enforcement plan of the ADEA "private litigation is discouraged." Agatstein, Age Discrimination Act, *supra*, 19 N.Y.L.F. at 319. Accord: *Burgett*, *loc. cit.*

§ 626(b). *Sant* v. *Mack Trucks, Inc.*, 424 F. Supp. 621, 622, 13 FEP Cases 854, 855 (N.D. Cal. 1976); Procedural Aspects of the Age Discrimination in Employment Act of 1967, 36 U. Pitt. L. Rev. 914, 916 (1975).

To be sure, the Secretary may attempt to settle a claim of age discrimination even in the absence of notice that the claimant intends to file suit in district court. But discussion of settlement under such circumstances was not what Congress envisioned when it mandated a sixty-day conciliation period after notice of an impending private lawsuit. Courts considering Section 7(d)(1) have pointed out four important functions served by the requirement that timely notice of intent to sue be given in advance of the conciliation period. First, it insures that potential defendants become aware of their position and the real possibility of litigation soon after the allegedly discriminatory event, because the statute (Section 7(d)(2)) requires the Secretary to inform all prospective defendants of a proper notice of intent to sue. E.g., *Powell*, *supra*, 8 FEP Cases at 3.[15] Second, timely notice serves to promote good faith negotiations by employers during the statutory 60-day conciliation period. *Ibid.* Third, timely notice facilitates preservation of records and evidence for trial should conciliation fail. *Ibid.* Fourth, prompt notice provides the Secretary with the opportunity to invoke the preferred "conciliatory and mediative ac-

[15] See *Int'l Union Electrical Workers, Local 790* v. *Robbins & Myers, Inc.*, —— U.S. ——, ——, 13 FEP Cases 1813, 1817 n. 14 (1976) where the Court observed that "[a]dherence to the limitations period [of former section 42 U.S.C. § 2000e-5(d)] assures prompt notification to the employer of a charge of an alleged violation of Title VII."

tion to avert litigation" while a dispute is fresh. *E.g.*, *McCrickard* v. *Acme Visible Records, Inc.*, 409 F. Supp. 341, 343, 344, 13 FEP Cases 822, 823, 824 (W.D. Va., 1976).

There is no dispute that Shell did not receive prompt, specific notice of any intention of Dartt to file a civil action with respect to the alleged unlawful practice. The Tenth Circuit, however, suggested that Dartt's prompt presentation of an oral grievance to the local Wage and Hour office, which grievance was promptly communicated to Shell, accomplished these statutory ends. Plainly, this is not so. An employer who is told that a law suit will be filed against it if conciliation of an alleged ADEA violation fails, is able to conciliate the issue much more realistically than an employer who merely is notified that a grievance has been turned in. As one court has noted recently in holding the notice requirements of Section 7 to be jurisdictional, the "'notice determines the scope of the alleged violation and thereby serves to narrow the issues for prompt adjudication and decision.'" *Looney* v. *Commercial Union Assurance Cos.*, 14 FEP Cases 843, 844 (E.D. Mich. 1977), citing the Title VII decision in *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 720, 2 FEP Cases 121, 127 (7th Cir. 1969). The analogy is persuasive under the ADEA, for an ambiguous grievance or complaint, unlike a timely notice of intent to sue, cannot "narrow issue for prompt [conciliation and mediation]." Without the specific flagging of a potential private legal action, and the concomitant sharpening of issues, the impetus for *both* parties to pursue conciliation seriously with the active assistance of the Secretary is lacking.

The lapse of time permitted by the decision below undermines the chances of success for the conciliation which Congress mandated. Promptness is a factor Congress plainly considered *central* to the effectiveness of the non-legal methods it chose to promote. The jurisdictional requirement of Section 7(d)(1)

> is intended to serve the purposes of the Act by insuring that the Secretary of Labor is called in for conciliation purposes *when disputes are fresh* and by informing the employer of his employee's intentions at an early date. (emphasis added).

Moses v. *Falstaff Brewing Corp.*, 525 F. 2d 92, 94, 11 FEP Cases 828, 830 (8th Cir. 1975). Accord: *Platt* v. *Burroughs Corp.*, 14 FEP Cases 1057, 1060 (E.D. Pa. 1976); *McCrickard* v. *Acme Visible Records, Inc.*, *supra*, 13 FEP Cases at 823. The preferred conciliation remedy is reduced to a matter of form without substance when the dispute involved is stale. Strict compliance with the statutory notice requirements, on the other hand, promotes conciliation by ensuring that it takes place before the parties' positions have hardened and before the passage of time has caused substantial sums for backpay, benefits, or attorney fees [16] to accrue. Cf. *Rogers* v.

[16] The ADEA incorporates Section 16(b) of the FLSA (29 U.S.C. 216(b)), which section provides for the award of attorney's fees by the court in appropriate cases. See *Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 20 WH Cases 500, 506 (7th Cir. 1971). If the 180-day period is strictly construed, an ADEA claimant usually will have incurred only minimal attorney fees at the time the Secretary conducts conciliation and mediation. Thus, large sums for this item will not be a barrier to successful conciliation and mediation.

Exxon, *supra*, 14 FEP Cases at 523-524. Certainly, the prospects for successful conciliation are diminished greatly where these sums have grown because timely notice has not been given.

A further consideration is that, although an employee may contact the Department with any sort of amorphous grievance which the Department may make some attempt to resolve, the statutory duty to use "exhaustive" efforts to settle a dispute devolves upon the Secretary for at least a 60 day period *only* after notice of intent to sue over a specific action is given. Section 7(d)(2) and see *supra*, pp. 8-9. This case illustrates that the Secretary's attempts to resolve a grievance or complaint do not meet the heavy burden of the statute (see *Brennan* v. *Ace Hardware*, *supra*) to conduct mediation and conciliation vigorously after notice of intended suit is filed. For the local Wage Hour Division did not attempt serious statutory conciliation until after Dartt's untimely notice of intent to sue—despite supposed earlier efforts to "conciliate" based on her grievance.

The Sixth Circuit analyzed the effect of the submission of a similar type complaint to the Labor Department by an individual alleging age discrimination in *Hiscott* v. *General Electric Co.*, 521 F.2d 632, 11 FEP Cases 292 (6th Cir. 1975). In that case, a Labor Department official had written to complainant Hiscott (*id.* at 293):

> I am not aware of your having notified the Secretary of Labor that you are instituting an action against the firm, which is a requirement of the [Age] Act. The fact that you submitted information concerning an alleged unlawful prac-

> tice to our agency is not considered such a notice.

The court cited and agreed with the district court decision herein, in holding that the Labor Department was correct in pointing out that (*ibid*):

> the mere furnishing of information to the agency concerning an alleged unlawful practice does not constitute notice of intent to sue as mandated by the statute. [citations omitted].[17]

As almost every court considering the issue has concluded, a potential defendant does not receive notice of an imminent lawsuit when the complainant files a written complaint with the Secretary (e.g. *Hiscott*), asks the Secretary to bring suit (e.g. *Powell*) or complains orally to the local Wage & Hour Office representative (e.g. *Acford* v. *Exxon Corp.*, 12 FEP Cases 1500, 1502 (D. Conn. 1975)).[18]

[17] The opinion expressed by the official in *Hiscott* was consistent with the Department's interpretation of the requirements for complying with Section 7(d) as expressed in an administrative opinion letter issued shortly after the effective date of the ADEA. Thus, Assistant Secretary of Labor Donahue stated (BNA FEP Manual 401:5212) (issued Aug. 26, 1968):

> No particular form is necessary in order to notify the Secretary of Labor of an intent to file suit under the Age Discrimination in Employment Act. Such notice should be provided in writing, however, . . .

See *Burgett* v. *Cudahy, supra*, 361 F. Supp. at 621, 6 FEP Cases at 204. The § 7(d)(1) notice must "contain the basic facts which will enable the Secretary to perform his functions . . . [and] be provided in writing." *Ibid.*

[18] Accord: *Powell, supra*, 494 F.2d at 489, 8 FEP Cases at 4; *Burgett* v. *Cudahy Co., supra*, 361 F. Supp. at 621, 6 FEP Cases at 204.

In sum, the incomplete and ineffective "notice" rejected in such cases, but held to trigger tolling herein, assures that the conciliation-mediation function cannot occur in the framework Congress intended. The framework Congress contemplated and required through the explicit requirements of § 7(d)(1) is one where the parties enter the conciliation process with a fresh dispute and are unequivocally advised that a private lawsuit will almost inevitably follow unsuccessful conciliation.

CONCLUSION

For the foregoing reasons, the *Amicus Curiae* submits that the district court correctly construed Section 7(d)(1) of the ADEA, and that the judgment of the court of appeals should be reversed with directions to reinstate the order of the district court dismissing the complaint.

Respectfully submitted,

JAY S. SIEGEL
SIEGEL, O'CONNOR & KAINEN
60 Washington Street
Hartford, Connecticut 06106

FRANK C. MORRIS, JR.
McGUINESS & WILLIAMS
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Of Counsel:

McGUINESS & WILLIAMS
ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006